2002

Provo City, a Municipal Corporation, Appellee/ Plaintif v. Kay J. Ivie, Krisitine J. Lee, Edward R. Lee, Spring Canyon Limited Partnership; Canyon Acres Limited Partnership; Robert Lee Kenner and Kirma P. Kenner : Brief of Appellee

Utah Supreme Court

Mr. David C. Dixon; Attorneys for Plaintiff/Appellee; Mr. Harold A. Hintze; Special Attorney for Plaintiff/Appellee.
M. Dayle Jeffs; Jeffs & Jeffs, P.C.; Defendants/Appellants.

IN THE SUPREME COURT OF UTAH

PROVO CITY, a Municipal Corporation, Appellee/Plaintiff, vs. KAY J. IVIE, DEVON R. IVIE, KRISTINE J. LEE, EDWARD R. LEE, SPRING CANYON LIMITED PARTNERSHIP; CANYON ACRES LIMITED PARTNERSHIP; ROBERT LEE KENNER and KIRMA P. KENNER Appellants/Defendants	BRIEF OF APPELLEE Case No. 20020980-SC (Subject to assignment to the Court of Appeals)

Interlocutory Appeal from an Order of Immediate Occupancy entered in the Fourth Judicial District Court by Hon. Anthony W. Schofield

M. Dayle Jeffs (#1655)
JEFFS & JEFFS, P.C.
90North 100 East
P.O. Box 888
Provo, UT 84603
Attorneys for Defendants/
Appellants

Harold A. Hintze (#1492)
P.0. Box 173
Fish Haven, ID 83287

David C. Dixon (#0890)
351 West Center Street
P.O. Box 1849
Provo, UT 84603
Attorneys for Plaintiff/Appellee

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P.0. Box 173
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David C. Dixon (#0890)
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P.O. Box 1849
Provo, UT 84603
Attorneys for Plaintiff/Appellee

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Jurisdiction

This Court has jurisdiction of this appeal by virtue of UTAH CODE ANN. §§ 78-2a-3(j) and 78-2-2(4)(2001).

Statement of Issue and Standard of Review

The sole issue preserved below and presented on appeal is whether a Municipality has extraterritorial condemnation to acquire private property for the construction of a public street and related utilities and services associated therewith. Resolution of that issue involves interpretation of the UTAH CONSTITUTION, art XI, sec. 5(b) and (c). Constitutional interpretation is a question of law which this Court reviews for correctness, giving no deference to the trial court's conclusion. (*State v. Contrel*, 886 P.2d 107, 111 (Utah App. 1994), *cert. denied*, No. 950059 (Utah May 9, 1995); *Financial Bancorp, Inc. v. Pingree & Dahle, Inc.*, 880 P.2d 14, 16 (Utah App. 1994))

Constitutional Provisions, Rules, Statutes, Cases determinative of Appeal

UTAH CONST. art XI, § § 5(b)(c)

"The power to be conferred upon the cities by this section shall include the following:

* * *

(b) To furnish all local public services, to purchase, hire, construct, own, maintain and operate, or lease, public utilities local in extent and use; to acquire by condemnation, or otherwise, within or without the corporate limits, property necessary for any such purposes, subject to restrictions imposed by general law for the protection of other communities; and to grant local public utility franchises and within its powers regulate the exercise thereof.

"(c) To make local public improvements and to acquire by condemnation, or otherwise, property within its corporate limits necessary for such improvements; and also to acquire an excess over than [that] needed for any such improvement and to sell or lease such excess property with restrictions, in order to protect and preserve the improvement."

UTAH CODE ANN. § 10-8-8. Streets, parks, airports, parking facilities, public grounds and pedestrian malls.

"They [municipalities] may lay out, establish, open, alter, widen, narrow, extend, grade, pave or otherwise improve streets, alleys, avenues, boulevards, sidewalks, parks, airports, parking lots or other facilities for the parking of vehicles off streets, public grounds, and pedestrian malls and may vacate the same or parts thereof, by ordinance."

UTAH CODE ANN. § 78-34-1. Uses for which right may be exercised.

"Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

> (3) Public buildings and grounds for the use of any county, city or incorporated town, or board of education; . . . pipes for conducting water for the use of the inhabitants of any county or city or incorporated town; . . . roads, streets and alleys; and all other public uses for the

> benefit of any county, city or incorporated town, or the inhabitants thereof.
>
> * * *
>
> 9) Sewerage of any city or town . . ."

The following provisions from the "Transportation Corridor Preservation Act" UTAH CODE ANN. § 72-5-401 (2001) *et. seq.,*

"(1) The department, counties, and ***municipalities*** may:

* * *

> (c) ***acquire fee simple rights*** and other rights of less than fee simple, including easement and development rights, or the rights to limit development, ***including rights in alternative transportation corridors***, and to make these acquisitions up to 20 years in advance of using those rights in actual transportation facility construction. (Utah Code Ann. §72-5-403 (1)(c) (2001))(Emphasis added)

"(2) In addition to the powers described under Subsection (1), counties and ***municipalities*** may:

> (a) limit development for transportation corridor preservation by land use regulation and by official maps; and
>
> (b) by ordinance prescribe procedures for approving limited development in transportation corridors until the time transportation facility construction begins."(Utah Code Ann. §72-5-403 (2)(a)(c)(2001))(Emphasis added)

(5) "***Taking***" means ***an act or regulation, either by exercise of eminent domain*** or other police power, whereby government puts private property to public use or ***restrains use of private property for public purposes***, and that requires compensation to be paid to private property owners. (Utah Code Ann. §72-5-401(5) (2001)) (Emphasis added)

(4) "Official map" means a map, drawn by government authorities and recorded in county recording offices that:

> (a) shows actual and proposed rights-of-way, centerline alignments, and setbacks for highways and other transportation facilities;
>
> (b) provides a basis for restricting development in designated rights-of-way or between designated setbacks to allow the government authorities time to purchase or otherwise reserve the land; and
>
> (c) for counties and municipalities may be adopted as an element of the general plan, pursuant to Title 17, Chapter 27, Part 3, General Plan, or Title 10, Chapter 9, Part 3, General Plan." (Utah Code Ann. §72-5-401(4)(a)(b)(c)(2001))

* * *

"(1) (a) The planning commission shall make and recommend to the legislative body a proposed general plan for the area within the municipality.

> (b) The plan may include areas *outside the boundaries of the municipality* if, in the commission's judgment, they are related to the planning of the municipality's territory. (Utah Code Ann. §10-9-302(1)(a)(b)(2001))(Emphasis added)

Statement of the case

This is an action in eminent domain wherein a City seeks to condemn property located in an island of "unincorporated" property within its municipal boundaries.[1] The City has determined that it is reasonable and desirable to extend its existing public street by a connector road from University Ave eastward to Canyon Road, thereby providing a major additional traffic artery from the northeast quadrant of the City through the Defendants property (and others) and then connecting with 4800 North Street in Provo and onto Center Street in Orem and from there to the interstate freeway system. (R. 335) The District Court entered an Order of Immediate Occupancy and the landowners filed a Petition for Leave to File an Interlocutory Appeal to challenge that Order and that Petition was granted by this Court. The sole issue before the Court[2] is whether a municipality has extraterritorial condemnation powers to acquire property for construction of a public street wherein water and sewer will be located.

Summary of Arguments

The City contends that the UTAH CONSTITUTION grants to it the right to condemn property "within or without its corporate limits" as required to provide

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[1] See Provo City Zoning Map, and illustrative maps showing the subject property, environs and proposed location of the public improvements attached as Addendum "A"

[2] See Addendum "B"

"public services" and "public utilities" and that the proposed utilization of the property accomplishes that public purpose. The City maintains that statutory provisions implement the Constitutional grant of extraterritorial powers and that it has an express grant of such powers. The City contends, alternatively, that it has the power to condemn by "necessary implication" drawn from its expressed powers of eminent domain.

Argument

POINT I.

A MUNICIPALITY HAS EXPRESS EXTRATERRITORIAL CONDEMNATION POWERS TO ACQUIRE RIGHTS OF WAY FOR A PUBLIC STREET

A municipal corporation is a political subdivision of the sovereign State and is endowed by the State with powers to operate.

> "Municipalities shall be political subdivisions of the State of Utah, municipal corporations, and bodies politic with perpetual existence unless disincorporated according to law." (UTAH CODE ANN. §10-1-201 (2001))

As a political subdivision, its powers of eminent domain are dependent upon an express grant of that power from the sovereign.

> "That the powers of the city are strictly limited to those expressly granted, to those necessarily or fairly implied in or incident to the powers expressly granted, and to those essential to the declared objects and purposes of the corporation, is settled law in this state." (*American Fork City v. Robinson,* 77 Utah 168, 292 P. 249, 250 (1930))

As a *general* rule, use of condemnation powers by a governmental entity other than the sovereign itself is limited to the jurisdictional boundaries of that governmental entity.

> "As a general rule, the powers of a city are coextensive with its corporate limits." (*Plutus Mining Co. v. Orme*, 76 Utah 286, 289 P. 132 (1930)).

Therefore, if a municipality is to possess extraterritorial condemnation powers it must be by express grant from the legislature or arise by *necessary implication* ancillary to such an express grant:

> "***Generally***, a municipal corporation is confined to such area and is without power to acquire or hold real property beyond its territorial limits, ***unless the power to do so is expressly given by the legislature***." (McQUILLIN ON CORPORATIONS § 2.24 p.2-162)(Emphasis added)
>
> * * *
>
> "A municipality may also be granted power to take for its own public uses land residing within the boundaries of another city or town. However, such power is dependent upon ***an express or implied grant of the power***." (NICHOLS ON EMINENT DOMAIN, 3rd Ed. § 3.03[3][a] text and fn. 31.)(Emphasis added)
>
> * * *
>
> "The general rule is that the powers of a municipal corporation cease at its boundaries and such corporation cannot purchase or hold property beyond its territorial limits ***unless the power to do so has been expressly conferred upon***

> ***it by the Legislature.*** *(Koerber v. City of New Orleans*, 76 So. 2d 466 (La. Ct. App. 1955))(Emphasis added)
>
> "It has been repeatedly stated by this court 'that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,--not simply convenient, but indispensable.' 1 Dillon Municipal Corporations, 5th Ed., p. 448, § 237; *Walton* v. *Tracy Loan & Trust Co.,* 97 Utah 249, 92 P.2d 724; *Salt Lake City v. Kusse*, 97 Utah 113, 93 P.2d 671; *American Petroleum Co. v. Ogden City*, 90 Utah 465, 62 P.2d 557; *Utah Rapid Transit Co. v. Ogden City*, 89 Utah 546, 58 P.2d 1; *Wadsworth v. Santaquin City*, 83 Utah 321, 28 P.2d 161; *Salt Lake City v. Sutter*, 61 Utah 533, 216 P. 234; *City of Ogden City v. Bear Lake & River, etc., Co.*, 16 Utah 440, 52 P. 697, 41 L.R.A. 305; 37 Am. Jur. 722."(*Salt Lake City v. Revene*, 101 Utah 504; 124 P.2d 537, 540 (Utah 1942))
>
> * * *
>
> "A municipality has only such powers as are expressly granted it by the legislature, such as may be necessarily implied and incident to those expressly granted, and those indispensable to the accomplishment of the declared objects and purposes of the municipality." (*Parker v. Provo City Corp.,* 543 P.2d 769; (Utah 1975))(*citing, Revene, supra.*)

From statehood, Utah municipalities were granted very broad extraterritorial condemnation powers in order to allow them to provide all "local public services and utilities" to their residents:

> "The power to be conferred upon the cities by this section shall include the following:
>
> * * * *
>
> (b) ***To furnish all local public services***, to purchase, hire, construct, own, maintain and operate, or lease, *public utilities local in extent and use*; *to acquire by condemnation, or otherwise,* ***within or without the corporate limits,*** property necessary for any such purposes, subject to restrictions imposed by general law for the protection of other communities[3]; . . ." (UTAH CONST. art. XI, § 5(b))(Emphasis added)[4]

That extraterritorial grant of eminent domain power to municipalities was insulated from legislative diminishment or infringement of any kind:

> "Each city forming its charter under this section shall have, and is hereby granted, the authority to exercise all powers relating to municipal affairs, and to adopt and enforce within its limits, local police, sanitary and similar regulations not in conflict with the general law, *and no enumeration of powers in this constitution or any law shall be deemed to limit or*

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[3]In the case *sub judice* the city is not seeking to acquire property within the boundaries of another municipality–a circumstance which would seemingly conflict with the retained right of each Municipality to "lay out and design" its own streets under UTAH CODE ANN. § 10-8-8 (2001). But even in those circumstances Courts have held that it is necessary to "balance" the public benefit between such conflicting statutes and has estopped one city from preventing an adjacent city from constructing a road within its boundaries by enacting conflicting zoning regulations.(*City of Scottsdale v. Municipal Court of Tempe*, 90 Ariz. 393, 368 P.2d 637 (1967))

[4]"The power of the city to regulate the peace and good order of its citizenry is not dependent only on statute. It is constitutional, being derived from Sec. 5., Art. XI,"(*Allgood v.Larson*, 545 P.2d 530, 532;(Utah 1976) (dissenting opinion).

> *restrict the general grant of authority hereby conferred;"*(UTAH CONST. art. XI, § (5) (Emphasis added)

And the Utah Legislature further guaranteed those rights in subsequent legislation:

> Nothing in this chapter [Eminent Domain] must be construed to abrogate or repeal any statute providing for the taking of property in any city or town for street purposes." (UTAH CODE ANN. § 78-34-17 (2001))
>
> * * *
>
> "The powers herein delegated [Municipal Code] to any municipality shall be liberally construed to permit the municipality to exercise the powers granted by this act *except in cases clearly contrary to the intent of the law.*" (UTAH CODE ANN. § 10-1-103 (2001)) (Emphasis added)

Therefore provisions of state law which on their face may appear to suggest otherwise are clearly subservient to the constitutionally guaranteed extraterritorial right of eminent domain reposing in municipalities.[5]

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[5]*See e.g.*,

> "**City streets - Class C roads - Construction and maintenance.** (1) City streets comprise:
>
> (a) highways, roads, and streets *within the corporate limits of the municipalities* that are not designated as class A state roads or as class B roads; (UTAH CODE ANN. § 72-3-104 (2001))

County roads - Class B roads - Construction and maintenance by counties.

> (1) County roads comprise all public highways, roads, and streets within the state that:

Accordingly, pivotal to resolution of this appeal is the determination of whether a proposed public street, not located entirely within[6] the extant boundaries of a municipality and in which water and sewer lines will also be placed is either a "local public service[s]" and/or one of the "public utilities local in extent and use" permitting extraterritorial condemnation by a municipality.

Appellants assert that a public street is not a "public service or utility" but, rather is "a public improvement" and is governed by art. XI, Sec 5(c) limiting eminent domain to property "within" the municipalities corporate limits.

> "(c) To make local *public improvements* and to acquire by condemnation, or otherwise, property *within its corporate limits* necessary for such improvements; and also to acquire an excess over than [that] needed for any such improvement and to sell or lease such excess property with restrictions, in order to protect and preserve the improvement." (UTAH CONSTITUTION, art. XI, § 5(c))

The City asserts that a public street in which water and sewer lines will also be located are admittedly clearly "improvements" just as any and all constructed facilities are "improvements," but a transportation improvement is also a "public

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> (a) ***are situated outside of incorporated municipalities*** and not designated as state highways.(UTAH CODE ANN. § 72-3-103(2001)).

[6]Technically the Appellants property is "within the corporate limits" of Provo City as the *exterior* boundaries of the City completely surround their property. But it is assumed that the issue for interpretation means "within" the *jurisdictional* boundaries as opposed to pure geographic exterior boundaries.

services" or "public utilities" which can be located on easements obtained through extraterritorial condemnation under art. XI, sec 5(b).

In construing and applying Sections 5(b) and (c)[7] the Court is required to make an initial determination as to exigencies sought to be addressed or remedied by adoption of the specific constitutional provisions:

> "In interpreting these words and ascertaining their meaning as used, it becomes important to consider, in the light of the conditions and growing necessities of the municipalities, the scope and purpose of the entire provision. "*Constitutions are not to be interpreted alone by their words abstractly considered, but by their words read in the light of the conditions and necessities in which the provisions originated, and in view of the purposes sought to be attained and secured.*" Dillon Mun. Corp., sec. 3a." (*State v. O'Meara,* 23 Utah 13, 64 P. 460, 462(1900))(Emphasis added)
>
> * * *
>
> "A constitution is not to be interpreted on narrow or technical principles, but liberally, and on broad, general lines, *in order that it may accomplish the object of its establishment, and carry out the great principles of the government.* The words are not to be stretched beyond their fair sense, but within that

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[7]It should be noted that art. XI, § 5(b)(c) is the paramount source of a municipalities eminent domain powers with only a few specific additional bequests made in subsequent legislation–*i.e.,* the right to condemn for pedestrian malls under UTAH CODE ANN. § 10-15-5 (2001); the right to condemn water and water systems under UTAH CODE ANN. § 10-7-4 (2001); outdoor advertising billboards under UTAH CODE ANN. § 10-9-409 (2001); and air rights, navigation easements and non-conforming structures near airports under UTAH CODE ANN. § 72-10-413 (2001).All other takings for public uses and purposes must be premised on the Constitutional endowment of art. XI, § 5 or UTAH CODE ANN. §78-34-1(3)(2001).

> range the rule of interpretation must be taken which best follows out the apparent intention of its framers." Black, Interp. Laws, p. 13." (*North Point Consol. Irr. Co., v. Utah & S.L. Canal Co.,* 14 Utah 155, 46 P. 824, 825-26 (1896))
>
> * * *
>
> "Statutes which delegate the State's sovereign power of eminent domain to its political subdivisions are to be strictly construed. *Des Moines v. Hemenway*, 73 Wash. 29 130,437 P.2d 171 (1968); *State ex. rel. Devonshire v. Superior Court,* 70 Wash. 630, 424 P. 2d 913 (1967). However, as we said in Devonshire, a statutory grant of such power is not to be so strictly construed as to thwart or defeat apparent legislative intent or objective." (*In re Petition of City of Seattle*, 638 P.2d 549, 557 (Wash. 1981)"

The Courts task in construing legislation involving eminent domain is well defined:

> "The question therefore is, 'Is the right sought to be exercised by appellant granted in any one or more of the foregoing provisions?
>
> If the right is granted, the court has but one duty to perform, and that is to enforce it and make it effective. Upon the other hand, if the right is not granted, either in terms or by necessary implication, then the courts are powerless to grant the relief appellant seeks." (*Monetaire Mining Co. v. Columbus Rexall Consol. Mines Co.,* 53 Utah 413, 421, 174 P. 172, 175 (1918)).

Applying these interpretative guidelines it is respectfully submitted that "improvements" must logically refer to the common and customary usage of said words pertaining to permanent buildings traditionally located conveniently *"within"* the central portion of a city and constructed to conduct municipal activities therein,

e.g., its executive, administration and judicial buildings, schools, libraries, hospitals, public security and maintenance buildings. Whereas "services" and "utilities" are less audacious and more fluid undertakings, often somewhat consumptive in nature and thus being routinely enlarged, relocated, redesigned or even vacated as changing conditions dictate. Being more aqueous in nature they were not confined to the municipal boundaries but could be "within or without" the city limits. Clearly water and its impoundment and distribution systems, sewer collection and its treatment facilities, electrical generation sites and its distribution facilities -traditional "utilities" were foreseen to often exist naturally, or by preference and design, outside the city limits. And more modern "utilities" and "services" (such as transportation facilities and systems, airports, trams, subways, high speed commuter trains, ferries) have subsequently arisen and must fall somewhere within these two original Constitutional provisions.

"Utilities" are defined by Webster to include:

> "1 **:** fitness for some purpose or worth to some end
> **2 :** *something useful or designed for use*
> **3 a :** **PUBLIC UTILITY** **b** (1) **:** a service (as light, power, or water) provided by a public utility (2) **:** equipment or a piece of equipment to provide such service or a comparable service
> **4 :** a program or routine designed to perform or facilitate especially routine operations (as copying files or editing text) on a com uter" *(emphasis added)*

Services" are defined by Webster to include:

> "**1 a :** the occupation or function of serving <in active *service*> **b :** employment as a servant <entered his *service*>
> **2 a :** the work performed by one that serves <good *service*> **b : HELP, USE, BENEFIT** <glad to be of *service*> **c :** contribution to the welfare of others **d :** disposal **for** use <I'm entirely at your *service*>
> **3 a :** a form followed in worship or in a religious ceremony <the burial *service*> **b :** a meeting for worship -- often used in plural <held evening *services*>
> **4 :** the act of serving : as **a :** a helpful act <did him a *service*> **b :** useful labor that does not produce a tangible commodity -- usually used in plural <charge for professional *services*> **c : SERVE**
> **5 :** a set of articles for a particular use <a silver tea *service*>
> **6 a :** an administrative division (as of a government or business) <the consular *service*> **b :** one of a nation's military forces (as the army or navy)
> **7 a :** *a facility supplying some public demand* <telephone *service*> <bus *service*> **b :** a facility providing maintenance and repair" (emphasis added)

Since it is uncontested herein that one usage of the easement sought herein is indisputably for the placement of *traditional* "public utilities local in use" (water and sewer) it is perhaps unnecessary for this Court to determine if a public street, *alone*, is a "public service" or "public utility" under subsection 5(b) or is a "public improvement" under 5(c). But it is respectfully submitted that a public street is by itself also a "public service" and/or a "public utility."

An airport, comprised of miles of asphalt upon which motorized vehicles transport persons in and out of cities has been held to *be " . . . a well-nigh indispensable public utility*:"

> "Judicial notice has been taken of the fact that airplanes have been used for many years in the transportation of mail and passengers, that large sums of money has been devoted to the development of aircraft as a commercial industry, and that it has become '*an important, if not, indeed, a well-nigh indispensable public utility.*" (NICHOLS, "LAW OF EMINENT DOMAIN" 2nd Ed. § 7.35(1) p. 7-203; *quoting Thrasher v. Atlanta,* 173 S. E. 817, 819 (1958))

While several definitions within the Utah Code classify "utilities" in the traditional sense:

> (b) "Utility" includes telecommunication, gas, electricity, cable television, water, sewer, data, and video transmission lines, drainage and irrigation systems, and other similar utilities located in, on, along, across, over, through, or under any state highway. (UTAH CODE ANN. § 72-6-116 (1)(b) (2001))

the legislature has included within the definition of "public utility" transportation facilities for purposes of regulation by a special commission:

> "(15) (a) "Public utility" *includes every railroad corporation*, gas corporation, electrical corporation, distribution electrical cooperative, wholesale electrical cooperative, telephone corporation, telegraph corporation, water corporation, sewerage corporation, heat corporation, and independent energy producer . . ."(UTAH CODE ANN. § 54-2-1 (15(a) (2001))(Emphasis added)

And this Court has noted that providing transportation facilities is the providing of "public services:"

> "The appellant also claims that the case of *Dooly Block v. Salt Lake Rapid Transit Company* is authority for its claim to relief. There Salt Lake City had granted an easement to the defendant to construct a railway in the street in front of the plaintiff's business property. The use was for a private corporation *engaged in public services but for financial gain."*(*Anderson Inv. Corp., v. State,* 28 Utah 2d 379, 503 P.2d 144, 147 (1972) (emphasis added)

Moreover "local streets and roads" are "municipal services" for which budgeting and reporting requirements are imposed by law:

> (21) "Municipal capital project" means the acquisition, construction, or improvement of capital assets that facilitate providing municipal service.
>
> (22) "*Municipal service*" means a service not provided on a countywide basis and not accounted for in an enterprise fund, and includes police patrol, fire protection, culinary or irrigation water retail service, water conservation, local parks, sewers, sewage treatment and disposal, cemeteries, garbage and refuse collection, street lighting, airports, planning and zoning, *local streets and roads*, curb, gutter, and sidewalk maintenance, and ambulance service." ("Uniform Fiscal Procedures Act for Counties' UTAH CODE ANN. § 17-36-3 (21)(22)(2001))(Emphasis added))

The District Judge below astutely pronounced in his ruling on the Motion being reviewed: "The Court determines that providing adequate and reasonable transportation facilities to, from and within its boundaries is one of the most basic 'public services' or 'public utilities' which municipalities generally provide, and

therefore Provo City is permitted to utilize its constitutionally endowed power of eminent domain to acquire the property necessary to construct its proposed public street." (R.335)—and while no deference need be given to such conclusion, said conclusion is difficult to rebut.

Recent legislation clearly shows the legislative acknowledgment of the constitutional right and the intent to allow municipalities to acquire, by eminent domain, requisite easements for public streets *outside of their corporate limits*. The "Transportation Corridor Preservation Act" UTAH CODE ANN. § 72-5-401 (2001) *et. seq.*, enacted in 2000 clearly envisions the possible "taking" of property for streets by municipalities both "within and without" their corporate limits. Under that Act "the department [UDOT], counties, *and municipalities*" may "acquire" easements or fee interests in land which those entities determine are necessary for future transportation facility needs:

> "(1) The department, counties, and ***municipalities*** may:
>
> * * *
>
> (c) ***acquire fee simple rights*** and other rights of less than fee simple, including easement and development rights, or the rights to limit development, ***including rights in alternative transportation corridors***, and to make these acquisitions up to 20 years in advance of using those rights in actual transportation facility construction. (UTAH CODE ANN. §72-5-403 (1)(c)(2001))(Emphasis added)

This "acquisition" may be accomplished "directly or indirectly." It is accomplished "indirectly" by enactment of restrictions upon the future use and development of property proposed for future transportation needs or by direct acquisition (eminent domain or purchase):

> "(2) In addition to the powers described under Subsection (1), counties and ***municipalities*** may:
>
> > (a) limit development for transportation corridor preservation by land use regulation and by official maps; and
> >
> > (b) by ordinance prescribe procedures for approving limited development in transportation corridors until the time transportation facility construction begins."(UTAH CODE ANN. § 72-5-403 (2)(a), (c)(2001))

The Act acknowledging that such activity may well rise to a quantum of interference with private property rights so as to constitute a " regulatory taking" under other recently enacted legislation:

> "(1) The department, counties, and municipalities shall observe all protections conferred on private property rights, including Title 63, Chapter 90, Private Property Protection Act, Title 63, Chapter 90a, Constitutional Taking Issues, and compensation for takings. (UTAH CODE ANN. § 72-5-405 (1)(2001))[8]

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[8] "Regulatory takings" *require* condemnation and payment of just compensation: "As used in this chapter:

This concept of "regulatory takings" is perpetuated in the Transportation Corridor Preservation Act as well:

> (5) "***Taking***" means ***an act or regulation, either by exercise of eminent domain*** or other police power, whereby government puts private property to public use or ***restrains use of private property for public purposes***, and that requires compensation to be paid to private property owners. (UTAH CODE ANN. § 72-5-401(5)(2001))(Emphasis added)

Or, as noted above, the action may be "directly" " . . . by exercise of eminent domain." In summary, a municipality is permitted to "take" either by *act or regulation*, or *by the exercise of eminent domain*, requisite easements or fee interest in property for future transportation facilities. And how is this acquisition to be accomplished? By including said designated "corridors" within their adopted and recorded general land use plans:

> "(4) "Official map" means a map, drawn by government authorities and recorded in county recording offices that:

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(1) "Constitutional taking issues" means actions involving the physical taking or exaction of private real property by a political subdivision that might *require compensation* to a private real property owner because of:

(a) the Fifth or Fourteenth Amendment of the Constitution of the United States;

(b) Article I, Section 22 of the Utah Constitution; or

(2) "Political subdivision" means a county, municipality, special district, school district, or other local government entity. (UTAH CODE ANN. § 73-90a-1 (2001))

> (a) shows actual and proposed rights-of-way, centerline alignments, and setbacks for highways and other transportation facilities;
>
> (b) provides a basis for restricting development in designated rights-of-way or between designated setbacks to allow the government authorities time to purchase or otherwise reserve the land; and
>
> (c) for counties and municipalities may be adopted as an element of the general plan, pursuant to Title 17, Chapter 27, Part 3, General Plan, or Title 10, Chapter 9, Part 3, General Plan." (UTAH CODE ANN. § 72-5-401(4)(a)(b)(c)(2001))

Under UTAH CODE ANN. § 10-9-302 (2001) referred to above a municipality is specifically permitted to include for future development and use areas "outside the boundaries of the municipality:"

> "(1) (a) The planning commission shall make and recommend to the legislative body a proposed general plan for the area within the municipality.
>
> (b) The plan may include areas *outside the boundaries of the municipality* if, in the commission's judgment, they are related to the planning of the municipality's territory. (UTAH CODE ANN. § 10-9-302(1)(a)(b)(2001))

Therefore, it is futile to argue that a municipality cannot *directly* act under art. XI, sec 5(b) and acquire by extraterritorial condemnation property needed for a public transportation facility when it could *indirectly acquire* those same easements, extraterritorially, by the enactment of restrictions on the development of such

proposed future street sites with such prohibitory regulation on use of the land for any contrary purpose so that the enactment itself constitutes a " regulatory taking" and *requires* condemnation and payment of just compensation under the "Transportation Corridor Preservation Act" and " Private Property Protection Act." A city cannot be compelled to take such an indirect and circuitous route to acquire this land when the Constitution prohibits restrictive legislation on a municipality's rights to directly acquire property by extraterritorial condemnation.

POINT II

A MUNICIPALITY HAS IMPLIED EXTRATERRITORIAL CONDEMNATION POWERS TO ACQUIRE RIGHTS OF WAY FOR A PUBLIC STREET.

In addition to extraterritorial condemnation powers expressly granted, cities must have such powers to extend and connect their public streets, water and sewer facilities from one portion of their boundaries to another through temporary unincorporated areas under the " reasonably necessarily implied" doctrine.

> "The powers of a city are strictly limited to those expressly granted, to those necessarily or *fairly implied* in or incident to the powers expressly granted, *and to those essential to the declared objects and purposes of the corporation.*"(*American Fork City v. Robinson*, 77 Utah 168, 292 P. 249 (1930); *Stevenson v. Salt Lake City Corp.*, 7 Utah 2d 28, 317 P.2d 597 (1957); *Salt Lake City v. Revene*, 101 Utah 504, 124 P.2d 537, modified on other grounds, 101 Utah 512, 127 P.2d 254 (1942); (*Salt Lake City v. Sutter,* 61 Utah 533; 216 P. 234; 235 (1923)(Emphasis added)

* * *

> "Accordingly, while there is no settled rule in respect to this question, if the power exists to construct public works or improve property outside the municipal limits, and the statute or charter expressly or by necessary implication authorizes the condemnation of property within the corporate limits for such purposes, then the municipality is impliedly authorized to condemn outside the limits for such purposes." (McQUILLIN, "MUNICIPAL CORPORATIONS" § 32.66 P. 524. *citing North Sacramento v. Citizens Util. Co. of Calif.,* 192 Cal App 2d 482, 13 Cal Rptr 538; *Carlsbad v. Wight,* 221 Cal App 2d 911, 34 Cal Rptr 820; *Village of Deerfield v. Rapka,* 54 Ill 2d 217, 296 NE2d 336; *Helm v. Grayville,* 224 Ill 274, 79 NE 689; *City of Gulfport v. Orange Grove Utilities,* 735 So 2d 1041 (Miss 1999); *City of Springfield v. Brechbuhler,* 895 SW2d 583 (Mo. 1995); *Central Power Co. v. Nebraska City,* 112 F2d 471; *Charlotte v. Heath,* 226 NC 750, 40 SE2d 600; *Payallup v. Lacey,* 43 Wash 110, 86 P. 215))

This Court has applied the "necessarily implied" doctrine of *Sutter* to find jurisdiction to condemn where, as in the case *sub judice,* multiple "public services" are involved. In *Utah DOT v. Fuller*, 603 P.2d 814 (Utah 1979) this Court held that UDOT could condemn property for a "sewage treatment lagoon" *impliedly* from its grant of power to condemn for a "rest stop" where drinking water and toilet facilities were to be constructed.

> "Plaintiff's authority to acquire real property for highway purposes generally and roadside rest areas specifically is set out in § 27-12-96 and subsection (11), Utah Code Annotated (1953), as amended. That statute states that the term 'highway purposes' is not limited exclusively to those

> enumerated. It is obvious that rest areas offering drinking water and toilet facilities require waste disposal provisions. The record in this case supports the sewage lagoon as the disposal method of choice. Since the statutory language authorizes 'the construction and maintenance of roadside rest areas,' and the term 'maintenance' would logically include waste disposal necessitated by services offered at the rest area, the power to construct and maintain a sewage lagoon may be implied in the statutory grant of power relied upon by plaintiff. See *Illinois State Toll Highway Commission v. Eden Cemetery Association,* 16 Ill.2d 539, 158 N.E.2d 766, 769-770 (1959), where the court said in connection with condemnation for service facilities on toll highways, 'We think . . . . that since access to sewer and water facilities is essential to the operation of service stations and restaurants, the reasoning which sustains the propriety of arrangements for the latter must uphold as well a reasonable exercise of condemnation powers in obtaining the former.' *See also Tormaschy v. Hjelle,* N.D., 210 N.W.2d 100 (1973).
>
> Although defendants cite *Great Salt Lake Authority v. Island Ranching Co.,* 18 Utah 2d 276, 421 P.2d 504 (1966), for the contention that the power to condemn cannot be obtained by implication, their reliance is misplaced. In that case the authority was created by statute to preserve and develop the Great Salt Lake, but its statutory powers with reference to the acquisition of property on Antelope Island did not include the right to take by eminent domain. Plaintiff in the present case clearly has express statutory condemnation powers for highway purposes." (*Utah DOT v. Fuller*, 603 P.2d 814,816 (Utah 1979))

In the case *sub judice*, the reverse exists. The city has indisputable power to condemn extraterritorially for public utilities (water and sewer lines), and therefore it must, under the rationale of *Fuller* by that same "necessary implication" possess the power to condemn for the road in which to locate, access and maintain those public utilities.

> "We think it is generally agreed that where the right of eminent domain is granted for a particular purpose, then the statute must be given a liberal construction in furtherance of such purposes." (*Monetaire Mining Co. v. Columbus Rexall Consol. Mines Co.*, 53 Utah 413, 422, 174 P. 172, 175 (1918))
>
> * * *
>
> "The powers herein delegated to any municipality shall be liberally construed to permit the municipality to exercise the powers granted by this act except in cases clearly contrary to the intent of the law." (UTAH CODE ANN. § 10-1-103 (2001))

The constitutional grant to Utah municipalities is so concise and unequivocal that there are no recorded cases of any successful challenge to a municipalities' exercise of those powers since statehood. The only reported appellate decision in Utah wherein extraterritorial condemnation was challenged arose in *Bertagnoli v. Baker,* 117 Utah 348, 215 P.2d 626 (Utah 1950) heavily relied upon herein and below by Appellants. In that case the Salt Lake City *School Board*, (not the City itself, but a separate legislatively created entity[9])

---

[9]"In previous decisions of this court we have recognized that boards of education are public municipal corporations; that their powers are purely statutory; and that the legislature may authorize the governing authorities of school districts to do anything not prohibited by the Constitution. Also, that the boards of education have only such powers as are expressly conferred upon them and such implied powers as are necessary to execute and carry into effect their express powers. *Chamberlain v. Watters*, 10 Utah 298, 37 P. 566; *Beard v. Board of Education*, 81 Utah 51, 16 P.2d 900. Thus we must examine the statutes of this state to determine the extent of the authority given to boards of education to condemn land for proper purposes." (*Bertagnoli*, p. 628)

attempted to condemn property outside its jurisdictional boundaries. This Court recognized the general principles above set forth, citing both NICHOLS and McQUILLIN allowing municipal extraterritorial condemnation where expressly granted or necessarily implied, but refused to extend that extraterritorial condemnation powers to a School Board:

> "In McQuillin on Municipal Corporations, Second Ed., Revised, Sec. 1619, pg. 546, it is stated that 'a municipal corporation cannot condemn land within the state but outside its corporate limits ***unless the power has been delegated by the legislature***.' See Lewis, Eminent Domain, 3rd Ed., Sec. 371, for a similar statement. When the power of eminent domain is given by statute, it is a well settled principle of law amply supported by cases from many jurisdictions in this country, that the extent to which the power may be exercised is limited to the express terms and clear implication of the statute. *City of Birmingham v. Brown*, 241 Ala. 203, 2 So.2d 305; *Maine-New Hampshire Interstate Bridge Authority v. Ham*, 91 N.H. 179, 16 A.2d 362; *Detroit G. H. and M. Railway Company v. Weber,* 24, Mich. 28, 226 N.W. 663; *U. S. v. Threlkeld*, 10 Cir., 72 F.2d 464, *certiorari denied* 293 U. S. 620, 55 S.Ct. 215, 79 L. Ed. 708; *State ex rel. King County v. Superior Court for King County*, Wash., 204 P.2d 514; *Lewis*, Eminent Domain, 3rd Ed., Sec. 371." (emphasis added)

The Court denied the School Board extraterritorial condemnation power in the absence of either an express statutory grant or a more logically implied grant of such power *other than the argued silence of the Legislature and/or the absence of a specific prohibition denying Boards that power*:

> "Thus it follows that the authority contended for by the School Board ***not having been expressly given and not being clearly inferable from our statutes***, must be denied it. Under the authorities on this subject, power cannot be derived from the doubtful inferences which support the School Board's claim of authority." (*Id.*)(emphasis added)

While *Bertagnoli* is Appellants chief case, it is simply not helpful precedent.

Without such broad extraterritorial powers municipalities would often be precluded from providing even the most basic public utilities and services such as water, electricity, sewer, solid waste disposal, and airports because those amenities are often located in remote areas beyond city boundaries, the more obnoxious of those facilities being deliberately planned and constructed some distance outside city boundaries so as to avoid creating public nuisances in residential and commercial areas. Those facilities require access roads and streets and it is absurd to suggest that municipalities can create or develop such facilities but cannot create extraterritorially the necessary public streets to access and maintain them. Accordingly Utah, like most states in the Union, expressly provided for extraterritorial condemnation powers in cities to allow them to provide basic services and utilities.

Cities must be able to plan for the orderly flow of traffic in, out and through their jurisdictions and allow for future connections and alignments with existing streets in other jurisdictions and with interstate facilities. Cities often have temporary pockets of unincorporated land within or adjacent their

boundaries awaiting petitions for annexation and it is absurd to suggest that all city streets and service facilities have to terminate at the boundaries of said unincorporated property or take a circuitous temporary alignment. Such a truncated planning system would lead to absurd temporary street configurations and traffic congestion, the avoidance of which can only be resolved by permitted annexation with windfall concessions to landowners who could prevent the acquisition of rights of way for needed public utilities and services through their property if eminent domain was unavailable. Those concessions often result in an exorbitant extracted purchase price or outlandish development concessions (development fee waivers, increased permitted density development, zoning concessions, *etc.*,)- and it is precisely for that reason that the Legislature protected, by Constitutional guarantee not capable of abridgment by subsequent legislation, municipalities extraterritorial eminent domain powers to provide all of their basic public services and utilities, not the least of which are the public streets allowing orderly flow of traffic in, out, and through a city and the placement therein the ancillary additional public utilities commonly located therein.

Summary

A city is a living and vibrant creation. It must, like the human body, have the necessary circulatory vessels to transport in, out and through its being its life supporting commodities-- water, sewer, electricity, gas, communication facilities

and, most importantly, the people who comprise the city and produce and consume those commodities. It cannot be strangled by imposing restrictions on its ability to procure the necessary rights to maintain its life sustaining systems. For this reason the Constitution granted extremely broad extraterritorial condemnation powers to municipalities to insure their growth, vitality and survival–imposing strong prohibition on any attempted constriction of those powers. Public streets are the aorta in this system. Within their margins are customarily located all of the smaller vessels carrying ancillary services and utilities-- water, sewer, gas, and along its boundaries electric power and communication facilities. It makes no sense to suggest that a city has the ability to transport all those commodities in and out of its borders through extraterritorial condemnation of the requisite easements, but the inability to also construct on said easements a street to access and maintain those facilities and to transport the people who produce and consume those items. Clearly no more basic "service" is provided by a city that the construction and maintenance of transportation facilities–whether they be generally classified as "services" of "utilities." Without the power to circulate its residents in and out of its corporate limits with streets that sometimes have to traverse temporarily unincorporated areas to reach county or state roads a city would suffocate in its own congestion. While the power of eminent domain, being in derogation of private property rights, is to be strictly construed and applied, the allowance of easements which encumber the surface use rights of property obtained to provide

circulation of human necessities (water, gas, sewer, electricity) to be additionally used for the circulation of those who consume or produce those necessities seems both logical and non-prejudicial to those already encumbered property rights. But the City is not to prevail herein because of "reasoned and logical necessity"–it is to prevail because it has the Constitutional right to condemn extraterritorially—a right that cannot be abridged.

Relief Sought

The Order of Immediate Occupancy entered below finding that the City has the "right to take" the subject easements for construction and maintenance of a public street, water and sewer facilities should be affirmed.

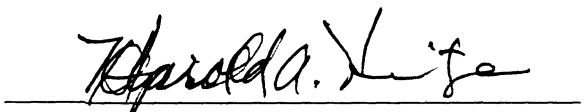
DATED this 17th of April, 2003. Harold A. Hintze

HAROLD A. HINTZE
Attorney for Respondent/Plaintiff

CERTIFICATE OF SERVICE

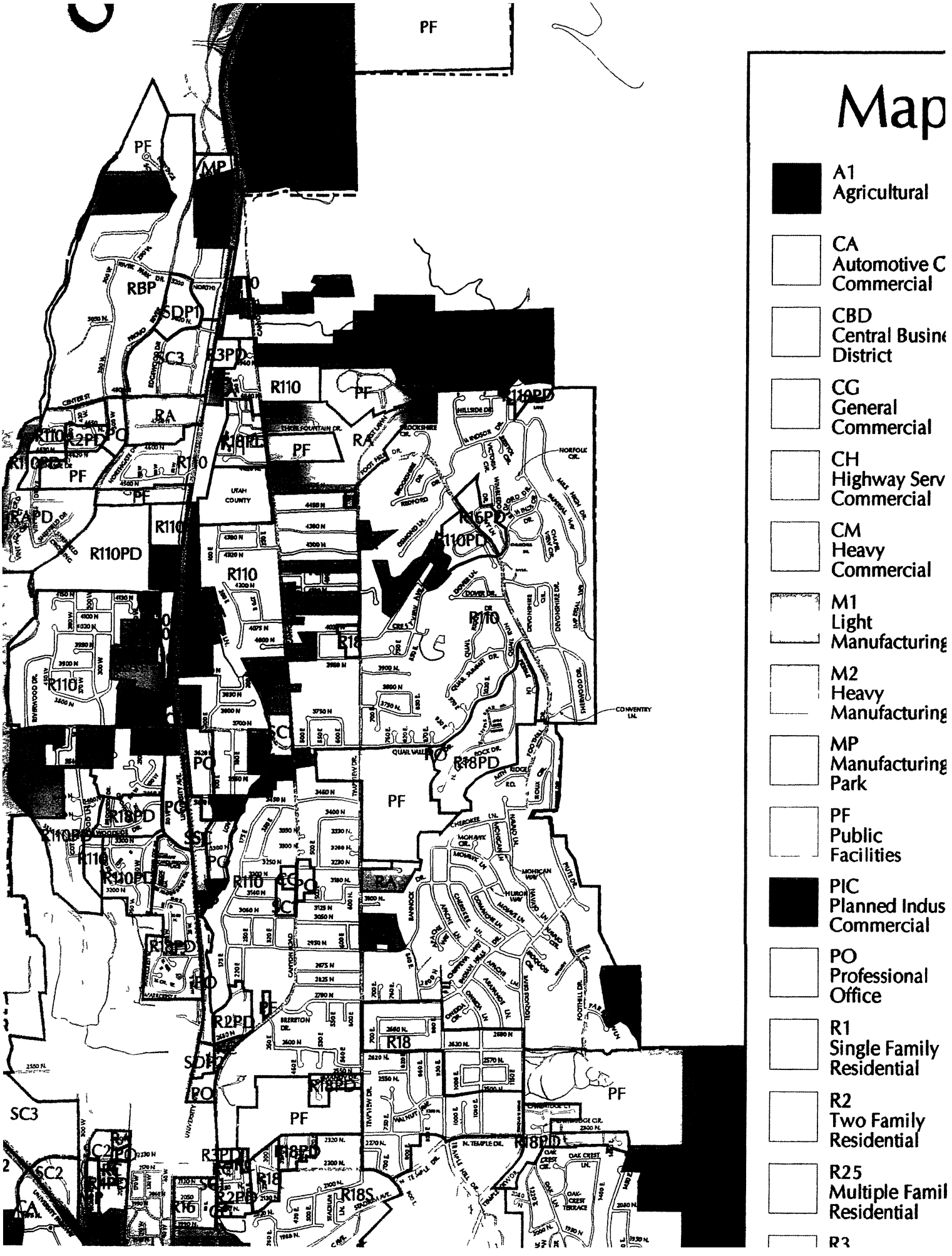
I hereby certify that on the 17th day of April, 2003, I mailed, postage prepaid two true and correct copies of the foregoing BRIEF OF RESPONDENT to the following:

M. Dayle Jeffs, Esq.,
JEFFS & JEFFS, P.C.
90 East 100 North
Provo, UT 84606



Harold A. Hintze
Special Attorney for Respondent

Addendum "A"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M1
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Heavy
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MP
Manufacturing
Park
PF
Public
Facilities
PIC
Planned Indus
Commercial
PO
Professional
Office
R1
Single Family
Residential
R2
Two Family
Residential
R25
Multiple Famil
Residential
R3
PF
MP
RBP
SDP1
SC3
R3PD
R110
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Addendum "B"

By open Court stipulation of Counsel at the hearing on the Order of Immediate Occupancy, the *sole* issue reserved for appeal was the issue of extraterritorial condemnation. The landowners offered not a scintilla of evidence or argument *as to any other issue*. The RULING ON MOTION FOR ORDER OF IMMEDIATE OCCUPANCY included the following finding:

> "9. The Defendants have not required Plaintiff to produce any additional testimony or evidence regarding the necessity for the "taking," the reasons for a speedy and immediate occupancy of the premises, the relative equities of granting or denying occupancy *pendente lite,* or any and all other factors required and prescribed by UTAH CODE ANN. § 78-34-9 (2001), said Defendants acknowledging that all such factors exist justifying entry of an order of immediate occupancy other than their claim that the Plaintiff lacks extraterritorial condemnation powers to condemn their property for purposes of a public street. Defendants deny that this Court has jurisdiction to entertain this action because the subject property is unincorporated and not within the boundaries of Provo City." (R. 333)

Therefore the following "facts" or "findings" in Appellants' Brief, undesignated by citation to the Record below, are irrelevant and immaterial to the singular issue reserved by stipulation of Counsel to be presented on appeal:

1. "Spring Canyon's property is located on the benchland approximately 100 feet above the road to which Provo City intends to connect the proposed road." (Appellants Brief, p. 3) (Unsupported by the record and irrelevant and immaterial)

2. "This problem [an island within the City] was created by the city's own annexation actions." (Appellants Brief, p. 3)(Argument not applicable to any issue herein)

3. "The Provo Municipal Council purportedly passed a resolution (2000-116) providing for the condemnation of the Spring Canyon's property on December 19, 2000 (Rec. Pg. 2) Roughly eighteen months passed before Provo City took official action pursuant to this resolution. (Rec. Pg. 35). . . In its resolution, the Provo Municipal Council stated that the purpose of the connector road was to ease traffic congestion created by the Riverwoods shopping center and other businesses located on the west side of University Avenue. (Rec. Pg. 112 & 2.) (Appellants Brief, p. 4) [And the balance of the factual recitation implying that the Resolutions and Complaint are disparate or defective is irrelevant and immaterial to the issue reserved]

4. "Although it will only create two lanes for automobile traffic, the proposed road design constitutes 83 (eighty-three) feet of right of way, to flare to 93 (ninety-three) feet as it approaches the Canyon Road from the west. (Rec. Pg. 102-103). It will require raising the level of the land sought to be condemned by 6' as it approaches the brow of the benchland." (Appellants

Brief, p. 5) (Again, no issue was raised or preserved concerning the "excessiveness" of the take, nor the public need or public use.)

5. "Spring Canyons presently use the land for agricultural purposes and in the operation of a livestock business. (Rec. Pg. 334 & 322-304). The proposed road will sever Spring Canyon's property, leaving a parcel located in the northeast section of their existing property. (See Map of Spring Canyon's Land, attached hereto as Exhibit "F", Rec. Pg. 118; see also Highlighted Map attached as Exhibit "G"). This action will essentially destroy Spring Canyon's use of the land. The construction of the road will not allow Spring Canyon to use the remaining land in its livestock operation because the lambing operations would be disturbed by the proximity of a major road." (Appellants Brief, p. 6) (Appellant omits to inform the Court that the City originally included the severed piece as an "uneconomic remnant" and planned on including it in the take—but it was "excluded" from the "taking" by stipulation of the parties after the Appellants requested the same—again, inflammatory argument, but not in the least relevant to the sole issue reserved for appeal.)

> "6. The proposed construction of the connector street would sever the Defendants property leaving a parcel located in the northeast section of their existing property. Plaintiff included within its Amended Complaint a request to condemn that parcel on the theory that it was an "uneconomic remnant" and the conduct of the City effectively, if not literally, constituted such an interference with the

use and utility of said severed parcel as to constitute a *de facto* "taking" thereof. Plaintiff has acknowledged that the "taking" of said severed parcel is not necessary to the accomplishment of the public purpose for which the other perpetual easements are sought (*i.e.,* the 4800 North connection) and has offered to delete said severed parcel from the Amended Complaint should the Defendants desire. The Defendants have indicated their desire that said parcel not be included within the "take" and, accordingly, by mutual stipulation of the parties, said parcel is to be stricken from the description of the property interests to be acquired herein by eminent domain." (R. 334)

Addendum C Constitutional and Statutory Provisions

UTAH CONSTITUTION, art XI, sec. 5

Sec. 5. [Cities and towns not to be created by special laws - Legislature to provide for the incorporation, organization, dissolution, and classification of cities and towns - Charter cities.]

The Legislature may not create cities or towns by special laws.
The Legislature by statute shall provide for the incorporation, organization and dissolution of cities and towns and for their classification in proportion to population. Any incorporated city or town may frame and adopt a charter for its own government in the following manner:
The legislative authority of the city may, by two-thirds vote of its members, and upon petition of qualified electors to the number of fifteen per cent of all votes cast at the next preceding election for the office of the mayor, shall forthwith provide by ordinance for the submission to the electors of the question: "Shall a commission be chosen to frame a charter?" The ordinance shall require that the question be submitted to the electors at the next regular municipal election. The ballot containing such question shall also contain the names of candidates for members of the proposed commission, but without party designation. Such candidates shall be nominated in the same manner as required by law for nomination of city officers. If a majority of the electors voting on the question of choosing a commission shall vote in the affirmative, then the fifteen candidates receiving a majority of the votes cast at such election, shall constitute the charter commission, and shall proceed to frame a charter.
Any charter so framed shall be submitted to the qualified electors of the city at an election to be held at a time to be determined by the charter commission, which shall be not less than sixty days subsequent to its completion and distribution among the electors and not more than one year from such date. Alternative provisions may also be submitted to be voted upon separately. The commission shall make provisions for the distribution of copies of the proposed charter and of any alternative provisions to the qualified electors of the city, not less than sixty days before the election at which it is voted upon. Such proposed charter and such alternative provisions as are approved by a majority of the electors voting thereon, shall become an organic law of such city at such time as may be fixed therein, and shall supersede any existing charter and all laws affecting the organization and government of such city which are now in conflict therewith. Within thirty days after its approval a copy of such charter as adopted, certified by the mayor and city recorder and authenticated by the seal of such city, shall be made in duplicate and deposited, one in the office of the

secretary of State and the other in the office of the city recorder, and thereafter all courts shall take judicial notice of such charter.

Amendments to any such charter may be framed and submitted by a charter commission in the same manner as provided for making of charters, or may be proposed by the legislative authority of the city upon a two-thirds vote thereof, or by petition of qualified electors to a number equal to fifteen per cent of the total votes cast for mayor on the next preceding election, and any such amendment may be submitted at the next regular municipal election, and having been approved by the majority of the electors voting thereon, shall become part of the charter at the time fixed in such amendment and shall be certified and filed as provided in case of charters.

Each city forming its charter under this section shall have, and is hereby granted, the authority to exercise all powers relating to municipal affairs, and to adopt and enforce within its limits, local police, sanitary and similar regulations not in conflict with the general law, and no enumeration of powers in this constitution or any law shall be deemed to limit or restrict the general grant of authority hereby conferred; but this grant of authority shall not include the power to regulate public utilities, not municipally owned, if any such regulation of public utilities is provided for by general law, nor be deemed to limit or restrict the power of the legislature in matters relating to State affairs, to enact general laws applicable alike to all cities of the State.

The power to be conferred upon the cities by this section shall include the following:

(a) To levy, assess and collect taxes and borrow money, within the limits prescribed by general law, and to levy and collect special assessments for benefits conferred.

(b) To furnish all local public services, to purchase, hire, construct, own, maintain and operate, or lease, public utilities local in extent and use; to acquire by condemnation, or otherwise, within or without the corporate limits, property necessary for any such purposes, subject to restrictions imposed by general law for the protection of other communities; and to grant local public utility franchises and within its powers regulate the exercise thereof.

(c) To make local public improvements and to acquire by condemnation, or otherwise, property within its corporate limits necessary for such improvements; and also to acquire an excess over than [that] needed for any such improvement and to sell or lease such excess property with restrictions, in order to protect and preserve the improvement.

(d) To issue and sell bonds on the security of any such excess property, or of any public utility owned by the city, or of the

revenues thereof, or both, including, in the case of public utility, a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate such utility.

History: Const. 1896; L. 1999, S.J.R. 5, § 8.

Provisions from the UTAH CODE ANN.

10-1-103. Construction.

The powers herein delegated to any municipality shall be liberally construed to permit the municipality to exercise the powers granted by this act except in cases clearly contrary to the intent of the law.

History: C. 1953, 10-1-103, enacted by L. 1977, ch. 48, § 1.

10-1-201. Municipalities as political subdivisions of the state.

Municipalities shall be political subdivisions of the State of Utah, municipal corporations, and bodies politic with perpetual existence unless disincorporated according to law.

History: C. 1953, 10-1-201, enacted by L. 1977, ch. 48, § 1.

10-7-4. Water supply - Acquisition - Condemnation - Protest - Special election.

The board of commissioners, city council or board of trustees of any city or town may acquire, purchase or lease all or any part of any water, waterworks system, water supply or property connected therewith, and whenever the governing body of a city or town shall deem it necessary for the public good such city or town may bring condemnation proceedings to acquire the same; provided, that if within thirty days after the passage and publication of a resolution or ordinance for the purchase or lease or condemnation herein provided for one-third of the resident taxpayers of the city or town, as shown by the assessment roll, shall protest against the purchase, lease or condemnation proceedings contemplated, such proposed purchase, lease or condemnation shall be referred to a special election, and if confirmed by a majority vote thereat, shall take effect; otherwise it shall be void. In all condemnation proceedings the value of land affected by the taking must be considered in connection with the water or water rights taken for the purpose of supplying the city or town or the inhabitants thereof with water.

History: L. 1903, ch. 103, § 1; C.L. 1907, § 206x2; C.L. 1917, § 575; R.S. 1933 & C. 1943, 15-7-4.

10-8-8. Streets, parks, airports, parking facilities, public grounds and pedestrian malls.

They may lay out, establish, open, alter, widen, narrow, extend, grade, pave or otherwise improve streets, alleys, avenues, boulevards, sidewalks, parks, airports, parking lots or other facilities for the parking of vehicles off streets, public grounds, and pedestrian malls and may vacate the same or parts thereof, by ordinance.

History: R.S. 1898 & C.L. 1907, § 206, subd. 8; L. 1911, ch. 120, § 1; 1915, ch. 100, § 1; C.L. 1917, § 570x8; L. 1919, ch. 11, § 1; R.S. 1933 & C. 1943, 15-8-8; L. 1965, ch. 18, § [1]; 1966 (2nd S.S.), ch. 1, § 1.

10-9-302. Plan preparation.

(1) (a) The planning commission shall make and recommend to the legislative body a proposed general plan for the area within the municipality.

(b) The plan may include areas outside the boundaries of the municipality if, in the commission's judgment, they are related to the planning of the municipality's territory.

(c) Except as otherwise provided by law, when the plan of a municipality involves territory outside the boundaries of the municipality, the municipality may not take action affecting that territory without the concurrence of the county or other municipalities affected.

(2) The general plan, with the accompanying maps, plats, charts and descriptive and explanatory matter, shall show the planning commission's recommendations for the development of the territory covered by the plan, and may include, among other things:

(a) a land use element that:

(i) designates the proposed general distribution and location and extent of uses of land for housing, business, industry, agriculture, recreation, education, public buildings and grounds, open space, and other categories of public and private uses of land as appropriate; and

(ii) may include a statement of the standards of population density and building intensity recommended for the various land use categories covered by the plan;

(b) a transportation and circulation element consisting of the general location and extent of existing and proposed freeways, arterial and collector streets, mass transit, and any other modes of transportation that are appropriate, all correlated with the land use element of the plan;

(c) an environmental element that addresses:

(i) the protection, conservation, development, and use of natural resources, including the quality of air, forests, soils, rivers and other waters, harbors, fisheries, wildlife, minerals, and other natural resources; and
(ii) the reclamation of land, flood control, prevention and control of the pollution of streams and other waters, regulation of the use of land on hillsides, stream channels and other environmentally sensitive areas, the prevention, control, and correction of the erosion of soils, protection of watersheds and wetlands, and the mapping of known geologic hazards;
(d) a public services and facilities element showing general plans for sewage, waste disposal, drainage, local utilities, rights-of-way, easements, and facilities for them, police and fire protection, and other public services;
(e) a rehabilitation, redevelopment, and conservation element consisting of plans and programs for:
(i) historic preservation; and
(ii) the elimination of blight and for redevelopment, including housing sites, business and industrial sites, and public building sites;
(f) an economic element composed of appropriate studies and an economic development plan that may include review of municipal revenue and expenditures, revenue sources, identification of base and residentiary industry, primary and secondary market areas, employment, and retail sales activity;
(g) recommendations for implementing the plan, including the use of zoning ordinances, subdivision ordinances, capital improvement plans, and other appropriate actions; and
(h) any other elements the municipality considers appropriate.
History: C. 1953, 10-9-302, enacted by L. 1991, ch. 235, § 13; 1992, ch. 23, § 7; 1992, ch. 93, § 3.

10-9-409. Existing outdoor advertising uses.

(1) A municipality may only require termination of a billboard and associated property rights through:
(a) gift;
(b) purchase;
(c) agreement;
(d) exchange; or
(e) eminent domain.
(2) A termination under Subsection (1)(a), (b), (c), or (d) requires the voluntary consent of the billboard owner.
History: C. 1953, 10-9-409, enacted by L. 1997, ch. 263, § 1.

10-15-5. Powers of acquisition and improvement.

The legislative body of the municipalities shall also have the power to acquire by gift, purchase, eminent domain, or otherwise, land, real property or rights of way which shall become part of the municipal street established as a pedestrian mall, or which shall otherwise be used by the municipality as a part of, or for purposes connected with, a pedestrian mall, and such lands, real property or rights of way may be improved in the same manner as municipal streets may be improved. The legislative body shall also have the power to make such improvements on mall intersections and intersecting streets or upon facilities acquired for parking and other related purposes where such improvements are necessary or convenient to the operation of the mall. The acquisitions and improvements authorized by this section shall be deemed "improvements."
History: L. 1966 (2nd S.S.), ch. 2, § 5.

17-36-3. Definitions.

As used in this chapter:
(1) "Accrual basis of accounting" means a method where revenues are recorded when earned and expenditures recorded when they become liabilities notwithstanding that the receipt of the revenue or payment of the expenditure may take place in another accounting period.
(2) "Appropriation" means an allocation of money for a specific purpose.
(3) (a) "Budget" means a plan for financial operations for a fiscal period, embodying estimates for proposed expenditures for given purposes and the means of financing the expenditures.
(b) "Budget" may refer to the budget of a fund for which a budget is required by law, or collectively to the budgets for all those funds.
(4) "Budgetary fund" means a fund for which a budget is required, such as those described in Section 17-36-8.
(5) "Budget officer" means the county auditor, county clerk, or county executive as provided in Subsection 17-19-19(1).
(6) "Budget period" means the fiscal period for which a budget is prepared.
(7) "Check" means an order in a specific amount drawn upon the depositary by any authorized officer in accordance with Section 17-19-3 or 17-24-1.
(8) "Countywide service" means a service provided in both incorporated and unincorporated areas of a county.
(9) "Current period" means the fiscal period in which a budget is prepared and adopted.
(10) "Department" means any functional unit within a fund which carries on a specific activity.

(11) "Encumbrance system" means a method of budgetary control where part of an appropriation is reserved to cover a specific expenditure by charging obligations, such as purchase orders, contracts, or salary commitments to an appropriation account. An expenditure ceases to be an encumbrance when paid or when the actual liability is entered in the books of account.
(12) "Estimated revenue" means any revenue estimated to be received during the budget period in any fund for which a budget is prepared.
(13) "Fiscal period" means the annual or biennial period for recording county fiscal operations.
(14) "Fund" means an independent fiscal and accounting entity comprised of a sum of money or other resources segregated for a specific purpose or objective.
(15) "Fund balance" means the excess of the assets over liabilities, reserves, and contributions, as reflected by its books of account.
(16) "Fund deficit" means the excess of liabilities, reserves, and contributions over its assets, as reflected by its books of account.
(17) "General Fund" means the fund used to account for all receipts, disbursements, assets, liabilities, reserves, fund balances, revenues, and expenditures not required to be accounted for in other funds.
(18) "Interfund loan" means a loan of cash from one fund to another, subject to future repayment; but it does not constitute an expenditure or a use of retained earnings, fund balance, or unappropriated surplus of the lending fund.
(19) "Last completed fiscal period" means the fiscal period next preceding the current period.
(20) "Modified accrual basis of accounting" means a method under which expenditures other than accrued interest on general long-term debt are recorded at the time liabilities are incurred and revenues are recorded when they become measurable and available to finance expenditures of the current period.
(21) "Municipal capital project" means the acquisition, construction, or improvement of capital assets that facilitate providing municipal service.
(22) "Municipal service" means a service not provided on a countywide basis and not accounted for in an enterprise fund, and includes police patrol, fire protection, culinary or irrigation water retail service, water conservation, local parks, sewers, sewage treatment and disposal, cemeteries, garbage and refuse collection, street lighting, airports, planning and zoning, local streets and roads, curb, gutter, and sidewalk maintenance, and ambulance service.
(23) "Retained earnings" means that part of the net earnings retained by an enterprise or internal service fund which is not segregated or reserved for any specific purpose.
(24) "Special fund" means any fund other than the General Fund, such as those described in Section 17-36-6.

(25) "Unappropriated surplus" means that part of a fund which is not appropriated for an ensuing budget period.
(26) "Warrant" means an order in a specific amount drawn upon the treasurer by the auditor.
History: L. 1975, ch. 22, § 3; 1983, ch. 71, § 1; 1983, ch. 73, § 2; 1985, ch. 210, § 1; 1986, ch. 105, § 1; 1996, ch. 212, § 10; 1999, ch. 300, § 18; 2001, ch. 241, § 52.

54-2-1. Definitions.

As used in this title:

* * * *

(15) (a) "Public utility" includes every railroad corporation, gas corporation, electrical corporation, distribution electrical cooperative, wholesale electrical cooperative, telephone corporation, telegraph corporation, water corporation, sewerage corporation, heat corporation, and independent energy producer not described in Subsection (15)(d), where the service is performed for, or the commodity delivered to, the public generally, or in the case of a gas corporation or electrical corporation where the gas or electricity is sold or furnished to any member or consumers within the state for domestic, commercial, or industrial use.

* * * *

History: L. 1917, ch. 47, art. 2, § 1; C.L. 1917, § 4782; L. 1925, ch. 12, § 1; R.S. 1933 & C. 1943, 76-2-1; L. 1948 (1st S.S.), ch. 7, § 1; 1957, ch. 106, § 1; 1959, ch. 94, § 1; 1965, ch. 106, § 1; 1969, ch. 153, § 1; 1984, ch. 50, § 1; 1985, ch. 97, § 1; 1985, ch. 98, § 1; 1985, ch. 180, § 1; 1985, ch. 188, § 1; 1985, ch. 253, § 1; 1986, ch. 13; 1986, ch. 194, § 8; 1986, ch. 215, § 1; 1989, ch. 20, § 1; 1992, ch. 227, § 1; 1995, ch. 173, § 3; 1995, ch. 316, § 6; 1996, ch. 170, § 47; 2000, ch. 55, § 1; 2001, ch. 212, § 1.

72-3-103. County roads - Class B roads - Construction and maintenance by counties.

(1) County roads comprise all public highways, roads, and streets within the state that:
(a) are situated outside of incorporated municipalities and not designated as state highways;
(b) have been designated as county roads; or
(c) are located on property under the control of a federal agency and constructed or maintained by the county under agreement with the appropriate federal agency.

(2) County roads are class B roads.
(3) The state and county have joint undivided interest in the title to all rights-of-way for all county roads.
(4) The county governing body exercises sole jurisdiction and control of county roads within the county.
(5) The county shall construct and maintain each county road using funds made available for that purpose.
(6) The county legislative body may expend funds allocated to each county from the Transportation Fund under rules made by the department.
(7) A county legislative body may use any portion of the class B road funds provided by this chapter for the construction and maintenance of class A state roads by cooperative agreement with the department.
(8) A county may enter into agreements with the appropriate federal agency for the use of federal funds, county road funds, and donations to county road funds to construct, improve, or maintain county roads within or partly within national forests.
History: L. 1963, ch. 39, § 22; 1967, ch. 50, § 1; 1991, ch. 137, § 13; 1993, ch. 227, § 296; 1994, ch. 120, § 31; C. 1953, 27-12-22; renumbered by L. 1998, ch. 270, § 72; 2000, ch. 324, § 2.

72-3-104. City streets - Class C roads - Construction and maintenance.

(1) City streets comprise:
(a) highways, roads, and streets within the corporate limits of the municipalities that are not designated as class A state roads or as class B roads; and
(b) those highways, roads, and streets located within a national forest and constructed or maintained by the municipality under agreement with the appropriate federal agency.
(2) City streets are class C roads.
(3) Except for city streets within counties of the first and second class as defined in Section 17-16-13, the state and city have joint undivided interest in the title to all rights-of-way for all city streets.
(4) The municipal governing body exercises sole jurisdiction and control of the city streets within the municipality.
(5) The department shall cooperate with the municipal legislative body in the construction and maintenance of the class C roads within each municipality.
(6) The municipal legislative body shall expend or cause to be expended upon the class C roads the funds allocated to each municipality from the Transportation Fund under rules made by the department.
(7) Any town or city in the third class may:

(a) contract with the county or the department for the construction and maintenance of class C roads within its corporate limits; or
(b) transfer, with the consent of the county, its:
(i) class C roads to the class B road system; and
(ii) funds allocated from the Transportation Fund to the municipality to the county legislative body for use upon the transferred class C roads.
(8) A municipal legislative body of any municipality of the third class may use any portion of the class C road funds allocated to the municipality for the construction of sidewalks, curbs, and gutters on class A state roads within the municipal limits by cooperative agreement with the department.
History: L. 1963, ch. 39, § 23; 1969, ch. 67, § 1; 1991, ch. 137, § 14; 1993, ch. 227, § 297; 1994, ch. 120, § 32; C. 1953, 27-12-23; renumbered by L. 1998, ch. 270, § 73; 2000, ch. 324, § 3.

72-5-401. Definitions.

As used in this part:
(1) "Corridor" means the path or proposed path of a transportation facility that exists or that may exist in the future. A corridor may include the land occupied or to be occupied by a transportation facility, and any other land that may be needed for expanding a transportation facility or for controlling access to it.
(2) "Corridor preservation" means planning or acquisition processes intended to:
(a) protect or enhance the capacity of existing corridors; and
(b) protect the availability of proposed corridors in advance of the need for and the actual commencement of the transportation facility construction.
(3) "Development" means:
(a) the subdividing of land;
(b) the construction of improvements, expansions, or additions; or
(c) any other action that will appreciably increase the value of and the future acquisition cost of land.
(4) "Official map" means a map, drawn by government authorities and recorded in county recording offices that:
(a) shows actual and proposed rights-of-way, centerline alignments, and setbacks for highways and other transportation facilities;
(b) provides a basis for restricting development in designated rights-of-way or between designated setbacks to allow the government authorities time to purchase or otherwise reserve the land; and
(c) for counties and municipalities may be adopted as an element of the general plan, pursuant to Title 17, Chapter 27, Part 3, General Plan, or Title 10, Chapter 9, Part 3, General Plan.

(5) "Taking" means an act or regulation, either by exercise of eminent domain or other police power, whereby government puts private property to public use or restrains use of private property for public purposes, and that requires compensation to be paid to private property owners.
History: C. 1953, 72-5-401, enacted by L. 2000, ch. 34, § 9.

72-5-402. Public purpose.

The Legislature finds and declares that the planning and preservation of transportation corridors is a public purpose, that the acquisition of public rights in private property for possible use as a transportation corridor up to 20 years in advance is a public purpose, and that acquisition of public rights in private property for possible use as alternative transportation corridors is a public purpose, even if one or more of the transportation corridors is eventually not used for a public purpose, so long as reasonable evidence exists at the time of acquisition that the corridor will be developed within 20 years.
History: C. 1953, 72-5-402, enacted by L. 2000, ch. 34, § 10.

72-5-403. Transportation corridor preservation powers.

(1) The department, counties, and municipalities may:
(a) act in cooperation with one another and other government entities to promote planning for and enhance the preservation of transportation corridors and to more effectively use the monies available in the Transportation Corridor Preservation Revolving Loan Fund created in Section 72-2-117;
(b) undertake transportation corridor planning, review, and preservation processes; and
(c) acquire fee simple rights and other rights of less than fee simple, including easement and development rights, or the rights to limit development, including rights in alternative transportation corridors, and to make these acquisitions up to 20 years in advance of using those rights in actual transportation facility construction.
(2) In addition to the powers described under Subsection (1), counties and municipalities may:
(a) limit development for transportation corridor preservation by land use regulation and by official maps; and
(b) by ordinance prescribe procedures for approving limited development in transportation corridors until the time transportation facility construction begins.
History: C. 1953, 72-5-403, enacted by L. 2000, ch. 34, § 11.

72-5-405. Private owner rights.

(1) The department, counties, and municipalities shall observe all protections conferred on private property rights, including Title 63, Chapter 90, Private Property Protection Act, Title 63, Chapter 90a, Constitutional Taking Issues, and compensation for takings.
(2) Private property owners from whom less than fee simple rights are obtained for transportation corridors or transportation corridor preservation have the right to petition the department, a county, or a municipality to acquire the entire fee simple interest in the affected property.
(3) (a) A private property owner whose property's development is limited or restricted by a power granted under this part may petition the county or municipality that adopted the official map to acquire less than or the entire fee simple interest in the affected property, at the option of the property owner.
(b) If the county or municipality petitioned under Subsection (3)(a) does not acquire the interest in the property requested by the property owner, then the county or municipality may not exercise any of the powers granted under this part to limit or restrict the affected property's development.
History: C. 1953, 72-5-405, enacted by L. 2000, ch. 34, § 13.

72-10-413. Purchase or condemnation of air rights or navigation easements.

A political subdivision within which the property or nonconforming use is located or the political subdivision owning the airport or served by it may acquire, by purchase, grant, or condemnation in the manner provided by the law under which political subdivisions are authorized to acquire real property for public purposes, an air right, navigation easement, or other estate or interest in the property or nonconforming structure or use in question if:
(1) it is desired to remove, lower, or otherwise terminate a nonconforming structure or use;
(2) the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this part; or
(3) it appears advisable that the necessary approach protection be provided by acquisition of property rights rather than by airport zoning regulations.
History: L. 1945, ch. 10, § 13; C. 1943, Supp., 4-0-80; C. 1953, 2-4-13; renumbered by L. 1998, ch. 270, § 320.

78-34-1. Uses for which right may be exercised.

Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:
(1) All public uses authorized by the Government of the United States.

(2) Public buildings and grounds for the use of the state, and all other public uses authorized by the Legislature.
(3) Public buildings and grounds for the use of any county, city or incorporated town, or board of education; reservoirs, canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county or city or incorporated town, or for the draining of any county, city or incorporated town; the raising of the banks of streams, removing obstructions therefrom, and widening, deepening or straightening their channels; roads, streets and alleys; and all other public uses for the benefit of any county, city or incorporated town, or the inhabitants thereof.
(4) Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, byroads, plank and turnpike roads, roads for transportation by traction engines or road locomotives, roads for logging or lumbering purposes, and railroads and street railways for public transportation.
(5) Reservoirs, dams, watergates, canals, ditches, flumes, tunnels, aqueducts and pipes for the supplying of persons, mines, mills, smelters or other works for the reduction of ores, with water for domestic or other uses, or for irrigation purposes, or for the draining and reclaiming of lands, or for the floating of logs and lumber on streams not navigable, or for solar evaporation ponds and other facilities for the recovery of minerals in solution.
(6) Roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines, quarries, coal mines or mineral deposits including minerals in solution; outlets, natural or otherwise, for the deposit or conduct of tailings, refuse or water from mills, smelters or other works for the reduction of ores, or from mines, quarries, coal mines or mineral deposits including minerals in solution; mill dams; gas, oil or coal pipelines, tanks or reservoirs, including any subsurface stratum or formation in any land for the underground storage of natural gas, and in connection therewith such other interests in property as may be required adequately to examine, prepare, maintain, and operate such underground natural gas storage facilities; and solar evaporation ponds and other facilities for the recovery of minerals in solution; also any occupancy in common by the owners or possessors of different mines, quarries, coal mines, mineral deposits, mills, smelters, or other places for the reduction of ores, or any place for the flow, deposit or conduct of tailings or refuse matter.
(7) Byroads leading from highways to residences and farms.
(8) Telegraph, telephone, electric light and electric power lines, and sites for electric light and power plants.
(9) Sewerage of any city or town, or of any settlement of not less than ten families, or of any public building belonging to the state, or of any college or university.

(10) Canals, reservoirs, dams, ditches, flumes, aqueducts and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light or heat.
(11) Cemeteries and public parks.
(12) Pipe lines for the purpose of conducting any and all liquids connected with the manufacture of beet sugar.
(13) Sites for mills, smelters or other works for the reduction of ores and necessary to the successful operation thereof, including the right to take lands for the discharge and natural distribution of smoke, fumes and dust therefrom, produced by the operation of such works; provided, that the powers granted by this subdivision shall not be exercised in any county where the population exceeds twenty thousand, or within one mile of the limits of any city or incorporated town; nor unless the proposed condemner has the right to operate by purchase, option to purchase or easement, at least seventy-five per cent in value of land acreage owned by persons or corporations situated within a radius of four miles from the mill, smelter or other works for the reduction of ores; nor beyond the limits of said four-mile radius; nor as to lands covered by contracts, easements or agreements existing between the condemner and the owner of land within said limit and providing for the operation of such mill, smelter or other works for the reduction of ores; nor until an action shall have been commenced to restrain the operation of such mill, smelter or other works for the reduction of ores.
History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-34-1; L. 1957, ch. 174, § 1; 1963, ch. 193, § 1; 1969, ch. 258, § 1; 1973, ch. 206, § 1; 1981, ch. 164, § 1.

78-34-17. Rights of cities and towns not affected.

Nothing in this chapter must be construed to abrogate or repeal any statute providing for the taking of property in any city or town for street purposes.
History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-34-17.